UNITED NATIONS

GENERAL

ASSEMBLY

Distr.
GENERAL

A/CN.9/378/Add.1
30 April 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-sixth session
Vienna, 5 - 23 July 1993

POSSIBLE FUTURE WORK

Addendum

Procurement of services

Note by the Secretariat

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INTRODUCTION

1. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. The Working Group commenced its work on this topic at its tenth session, held from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). The Working Group devoted its eleventh to fifteenth sessions to the preparation of the draft Model Law on Procurement which is before the Commission at the present session for final review and adoption (the reports of those sessions are contained in documents A/CN.9/331, 343, 356, 359 and 371).

2. At its tenth session the Working Group decided to limit the Model Law, at least initially, to the procurement of goods or construction and not to deal with the procurement of services (A/CN.9/315, para. 25). The Working Group decided that it would be preferable to first finalize model statutory provisions for the procurement of goods or construction before elaborating such provisions for the procurement of services. A principal reason for this decision was that certain aspects of the procurement of services are governed by different considerations from those that govern the procurement of goods and of construction.

3. As the preparation of model provisions on the procurement of goods and of construction is being completed at the present session, the Commission may wish at this stage to consider the possibility of formulating model statutory provisions for the procurement of services. At the fifteenth session the Working Group lent its support to the preparation by the Secretariat of a note on the desirability and feasibility of preparing uniform model provisions on the procurement of services. The Working Group indicated that the note could envisage different possible options as to the scope of services to be covered by such provisions (A/CN.9/371, para. 255). Accordingly, the present note addresses the desirability of preparing model provisions on the procurement of services, the main differences between procurement of services and procurement of goods or construction, and the possible contents of the model statutory provisions. The note also presents, in its annex, the proposed text of possible amendments and supplements to the UNCITRAL Model Law that would be designed to expand its scope to cover the procurement of services.

I. DESIRABILITY OF PREPARING MODEL STATUTORY PROVISIONS ON PROCUREMENT OF SERVICES

4. While the procurement of goods and of construction takes up the larger portion of the procurement budgets of most public entities, services constitute a significant component of total Government procurement in most countries. Futhermore, it would appear that the trend towards privatization will lead to the transfer to the private sector of services previously

performed exclusively by Government. However, many countries lack a well regulated system for the procurement of services.

5. National laws on the procurement of services display differences from State to State. While the laws of some States do contain provisions on the procurement of services, the laws in some other States do not clearly differentiate between the procurement of goods or construction and the procurement of services, and therefore fail to take account of the specific circumstances relevant to procurement of services. The laws in yet other States do not deal with the procurement of services at all. It would therefore seem that the procurement of services is, in many instances, not subject to procedures that are sufficiently open, fair and competitive to ensure adequate quality and a fair price for the public purchaser. In this context, model statutory provisions could be used to assess the adequacy of existing legislation and as a model for new legislation where none presently exists.

6. Subsequent to the earlier decision to delay formulation of provisions on services, a reason that has arisen for the preparation of model provisions in the near future is the need of various States that are already enacting domestic legislation on the basis of the Model Law to have a model for a comprehensive legislative framework for procurement, one that covers the procurement of services.

7. There have also been further developments in the treatment of procurement of services by multilateral organisations concerned with procurement. In particular, there are now concrete proposals within the General Agreement on Tariffs and Trade (GATT) aimed at extending the GATT Agreement on Government Procurement to also cover the procurement of services. Futhermore, the European Community, as a follow-up to its existing directives on procurement, has now enacted Council Directive (EEC) 92/50 relating to the Coordination of Procedures for the Award of Public Service Contracts. An expansion by UNCITRAL of the scope of its work to cover services would be in line with the steps taken by those organisations to broaden the scope of legal instruments governing procurement to encompass services.

II. DIFFERENCES BETWEEN PROCUREMENT OF SERVICES AND PROCUREMENT OF GOODS OR CONSTRUCTION

8. Unlike the procurement of goods or construction, the procurement of services typically involves the supply of an intangible commodity whose quality and exact content may be difficult to quantify. The precise quality of the services provided will be largely dependent on the skill and expertise of the service providers. This is in contrast to the supply of goods or of construction, where technical and quality specifications are more suited to be specified in the solicitation documents and are relatively easy to monitor and enforce during perfomance. Furthermore, contracts for the procurement of goods and of construction usually contain guarantees of quality and performance.

9. Since it is often not practicable to monitor and to enforce quality and performance standards in contracts for procurement of services, the best assurance that the procuring entity has of receiving high-quality services is to ensure that the supplier possesses a high level of technical competence and skill. The price of services has therefore often not been considered as important a factor in the evaluation and selection process as the quality and competence of the supplier. From this perspective, price-based procedures for evaluation and comparison of tenders as currently set out in article 29 of the Model Law would not necessarily be considered appropriate for the procurement of services.

10. Since technical criteria have usually been regarded as more important evaluation factors than price, the practice has tended to be to evaluate the technical and the price aspects of the offer separately. The service providers who have the best-evaluated technical ability then either compete on the basis of price or on the basis of an evaluated combination of both price and technical ability, or they engage in negotiations with the procuring entity regarding price or any other aspects of their tender.

III. POSSIBLE EVALUATION PROCEDURES FOR MODEL STATUTORY PROVISIONS ON SERVICES

11. Apart from the tendency to evaluate the price separately from other factors, the principles and procedures for the procurement of goods and of construction may generally be made applicable to the procurement of services. Variations would involve mainly the evaluation procedures and criteria so as to give effect to the relative importance of the technical competence and quality of the supplier.

12. Identification of the types of evaluation factors to be recognized is generally settled in practice. Those factors will usually concern: the general technical competence of the service providers; the qualifications and competence of the personnel specifically assigned to provide the services; and the suitability of alternative proposals, if any have been sought. Along with the evaluation criteria themselves, the relative weight to be given to each factor and the manner in which the weighting is to be applied in the evaluation should also be predetermined and disclosed to service providers in the solicitation documents.

13. There are basically three methods by which price can be taken into account separately from the evaluation according to technical criteria. In the first method, the service providers that attain the highest technical-competence rating (e.g. beyond a specified threshold level) are placed in a straightforward price competition in which the offer with the lowest price is to be selected. In the second method, the results of the technical evaluation and the price proposals are given relative weightings and the service provider with the highest combined evaluation is the successful one. In the third method, the procuring entity holds negotiations on the price or any other aspects of the tender with the provider with the highest technical rating, with the aim of getting the best value. If negotiations with that provider are unsuccessful, the procuring entity then negotiates with the provider rated second, and so on down the list, until a procurement contract is concluded, or until all remaining tenders are rejected.

IV. SCOPE OF SERVICES TO BE COVERED

14. Some States may wish to exempt certain services from the competitive procurement process. This would be mainly when the nature of certain services or that of their providers makes the services more amenable to being acquired directly, rather than being procured through competitive means. By "direct acquisition" is meant the obtaining by the procuring entity of the required services through direct purchase from a service provider, without having placed a number of service providers through a competitive procurement procedure. The European Community dealt with the issue of the scope of services to be covered by exempting some services (e.g. arbitration and conciliation services) from the operation of the Directive.

15. It would not necessarily be feasible or useful to attempt to list in a comprehensive way in a model law the scope of services to be covered by each enacting State, since States may differ as to which services to include. It would therefore appear to be preferable to leave the question of scope of services to be covered up to enacting States. Futher guidance on the issue could be provided in a commentary. This would be in keeping with the general approach of the Model Law to recognize that, while it is preferable to subject as much of public procurement as possible to the Model Law, States may wish to exclude certain types of procurement.

16. Some States may also wish to subject the procurement of different services to different procurement methods. The EC Directive provides three different procurement methods and divides services into two separate lists. The first list consists of "priority services", which are subject to the full operation of the Directive whereas the second, "non-priority" list, refers to services whose procurement is subject to less rigorous procedures. It may be noted that the EC hopes to review the Directive in three years with the intention of combining the two lists so as to make the Directive fully applicable to a wider range of service contracts.

V. POSSIBLE METHODS OF FORMULATING MODEL STATUTORY PROVISIONS

17. It would appear that the preferable method of formulating model provisions on the procurement of services would be to prepare an additional chapter ("IV bis") for the UNCITRAL Model Law on Procurement, dealing exclusively with the procurement of services. Such an additional chapter would necessitate a number of amendments in the Model Law, in particular with respect to definitions and the application of certain sections of the Model Law to the chapter on services.

18. The main advantage of the above approach is that it would result in a consolidated model law covering all procurement and would guide enacting States in the formulation of a consolidated law. Futhermore, it would avoid the preparation of an entirely separate model law on the procurement of services, an approach that would not only involve duplication of work but

would also have the disadvantage of presenting to States two model laws dealing with essentially the same subject matter. The suggested approach would also permit the Commission to adopt finally at the present session the Model Law, dealing with goods and construction. The Commission could then mandate the Working Group to prepare the additional chapter on services and to identify the amendments to the text of the Model Law, that would be needed to incorporate a chapter on services. It may also be considered desirable for the text of the provisions on services to be submitted to the Commission at its next session, in view of the urgent need for such model provisions in a number of countries.

19. The other method would be to provisionally approve the Model Law on Procurement (covering goods and construction) and to mandate the Working Group to prepare the extra chapter on services, but without re-opening matters of substance in the Model Law as approved. Using either method, once the additional chapter and the amendments are agreed, a consolidated, amended version of the Model Law, covering goods, construction and services, would then be issued.

ANNEX

DRAFT ADDITIONAL ARTICLES AND AMENDMENTS TO THE UNCITRAL MODEL LAW ON PROCUREMENT TO ENCOMPASS PROCUREMENT OF SERVICES

(The draft articles below are meant to be illustrative and are intended to assist in assessing the feasibility of preparing an additional chapter for the Model Law to encompass the procurement of services.)

DRAFT AMENDMENTS TO THE MODEL LAW

1. Add services to the definition of "procurement" and move the reference to "incidental services" to the definition of "goods" so that the definition of "procurement" would read as follows:

> "Procurement" means the acquisition by any means, including by purchase, rental, lease or hire purchase, of goods, construction or services.

Comment: The purpose of this amendment would be to add services to the scope of the Model Law.

2. Add a definition of services to read:

> (d bis) "Services" means the provision by suppliers or contractors of products that are neither goods nor construction.

Comment: A definition of services might be considered to be unnecessary. However, since there is a definition of "goods" and of "construction", for the sake of consistency a definition of services may also be included. The above definition would imply that all procurement by public entities could be governed by the Model Law since anything that did not constitute goods or construction would be defined as services.

3. Add a reference to incidental services in the definition of "goods" as follows:

"goods" includes raw materials, products, equipment and other physical objects of every kind and description, whether in solid, liquid or gaseous form, and electricity, and includes services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves.

Comment: In view of the deletion of the reference to incidental services from the definition of "procurement", the effect of this addition is to enable the procuring entity to procure incidental services that are an integral part of a goods-supply contract, in accordance with the provisions in the Model Law that regulate the procurement of goods. Otherwise, the procuring entity would have to procure those incidental services in accordance with the proposed chapter IV bis on the procurement of services. Such a reference to incidental services is already found in the definition of "construction".

4. In article 6(5), add a cross-reference to article 37w(4)(b) as follows: "Subject to articles 8(1), 29(4)(d) and 37w(4)(b)".

Comment: This amendment would add preferential margins based on nationality for the procurement of services as an additional exemption to the general rule of non-discrimination on the basis of nationality.

5. In article 7(1), add a cross-reference to chapter IV bis on services as follows: "... prior to the submission of tenders, proposals or offers in procurement proceedings conducted pursuant to chapters III, IV or IV(bis), ..."

Comment: This amendment would have the effect of expressly making the provisions of Article 7 on prequalification proceedings applicable to the procurement of services.

6. In article 9(2), add a cross-reference to article 37x(3)(b),(c),(d) and (e).

Comment: Article 9(2) deals with those communications in the procurement of goods or construction that would not have to be transmitted in a manner that provides a record of the communication. Those types of communications in the procurement of services are to be found in article 37x(3)(b),(c),(d) and (e).

7. In article 32(1) and (5), add a cross-reference to articles 37w(4)(a) and 37x concerning the acceptance of tenders in the procurement of services.

Comment: Article 32(1) and (5) makes a direct reference to provisions in the Model Law on the acceptance of tenders in the procurement of goods and of construction. The additional cross-references would have the effect of expressly making the provisions of Article 32(1)and (5) on acceptance of tenders applicable to the procurement of services.

8. In article 38, add a cross-reference to articles 37w(2),(3) and (4), and 37x(3)(d) and (e).

Comment: This amendment would have the effect of adding to the list of exclusions in article 38 the decisions of the procuring entity that, in the procurement of services, would not be subject to recourse proceedings.

DRAFT ADDITIONAL ARTICLES

CHAPTER IV bis METHODS AND PROCEDURES FOR PROCUREMENT OF SERVICES

Article 37s. Application of chapters I, III and V

(1) The provisions of chapters I, III and V of this Law shall apply to the procurement of services, except to the extent that those provisions are derogated from in this chapter.

(2) The provisions of chapters II and IV of this Law shall not apply to the procurement of services, except to the extent that those provisions are made applicable by this chapter.

Comment: Chapters I (General Provisions) and V (Review) apply to chapter IV bis because they are generally applicable to the entire Model Law. Chapter III (Tendering Proceedings) applies because, as stated in paragraph 11 of the present note, to a significant measure the principles and procedures for the procurement of goods and of construction can be applied to the procurement of services. The principal derogations from chapter III would therefore relate to the types of evaluation criteria and documentation required to evaluate qualifications and to examine, evaluate and compare tenders. Chapters II and IV do not apply because they concern conditions for use and procedures for procurement methods that are not applicable to the procurement of services except to the extent that articles 37y and 37z make them applicable.

Article 37t. Contents of invitation to tender and invitations to prequalify

(1) The invitation to tender shall contain:

(a) the information required in accordance with article 19(1), except the information referred to in sub-paragraphs (b) and (c) thereof;

(b) a description of the services to be procured;

(c) the desired or required time for the provision of the services.

(2) An invitation to prequalify shall contain at least the following information:

(a) the information required in accordance with article 19(1),(a),(d),(e),(g) and (h), and article 19(2)(a),(b),(c),(d) and (e);

(b) a brief description of the services to be procured.

* * *

Article 37u. Prequalification proceedings

(1) Prequalification proceedings shall be carried out in accordance with article 7, except to the extent derogated from in paragraph (2) of this article.

(2) The prequalification documents shall contain at least the following information:

(a) a request for information from the supplier or contractor on the experience and capacity of the personnel that will be involved in the provision of the services;

(b) a description of the services to be procured;

(c) the information referred to in article 7(3).

Article 37v. Contents of solicitation documents

(1) The solicitation documents shall contain at least the following information:

(a) the information referred to in article 21, except the information referred to in subparagraphs (d),(e),(g),(h),(i) and (u);

(b) a description of the services required;

(c) the required time in which the services are to be provided;

(d) the manner in which in the tender price is to be formulated;

(e) a request for information on the experience of the personnel that will be involved in the provision of the services, unless the information has been provided in prequalification proceedings in accordance with article 37u(2)(a);

(f) if alternative proposals to the contractual terms and conditions or to other requirements set forth in the solicitation documents are permitted or required, a statement to that effect;

(g) the criteria that will be used in evaluating the proposals and the relative weight to be accorded to the criteria in accordance with article 37w(1);

(h) the method by which the price will be taken into account in the evaluation of tenders in accordance with article 37w(4).

(2) If prequalification proceedings have not been engaged in, the solicitation documents shall also contain:

(a) a request for information on the past experience of the supplier or contractor and its personnel in providing services of a kind similar to those to be procured;

(b) the qualification criteria that will be used in the evaluation of tenders.

Comment on articles 37t, 37u and 37v: The additional documentation required by the procuring entity in the procurement of services is mainly intended to enable the procuring entity to ascertain the technical competence and ability of the supplier and contractor and of the personnel that will be assigned to implement the procurement contract.

Article 37w. Examination and evaluation

(1) The procuring entity shall establish the criteria for evaluating the tenders and determine the relative weight to be accorded to each criterion and the manner in which they are to be applied in the evaluation. The criteria shall concern:

(a) the experience of the suppliers and contractors and their technical competence in providing services comparable to those required by the procuring entity;

(b) the conformity of tenders with the requirements of the procuring entity;

(c) the qualifications and competence of the personnel proposed to provide the services;

(d) if alternative proposals were sought or required in accordance with article 21(g), the suitability and adequacy of the proposals made;

(e) the price.

(2) The procuring entity shall establish a threshold level with respect to quality and technical aspects that the tenders shall have to attain in order to merit futher consideration under paragraph (4) of this article.

(3) Without considering the price of the tenders, the procuring entity shall rate each tender in accordance with the factors for evaluating the tenders and the relative weight and manner of application of those factors as set forth in the solicitation documents. The procuring entity shall then rank the tenders in accordance with the ratings.

(4) (a) The procuring entity shall then compare the prices of the tenders that have attained a rating at or above the threshold level established in accordance with paragraph (2) of this article. The succesful tender shall be either:

(i) the tender with the lowest price; or

(ii) the tender with the highest combined evaluation of the price, and of technical capacity as rated in accordance with paragraph (3) of this article; or

(iii) the tender which the procuring entity selects after negotiations in accordance with article 37x.

(b) If authorized by the procurement regulations (and subject to approval by ... (each State designates an organ to issue the approval),) in evaluating and comparing the tenders, a procuring entity may grant a margin of preference for the benefit of tenders for provision of services by domestic suppliers or contractors. The margin of preference shall be calculated in accordance with the procurement regulations.

Comment: Article 37w is meant to give effect to the principle referred to in paragraphs 8 to 10 of the present note that the major factor in the examination and evaluation of tenders in the procurement of services is the technical competence and ability of the supplier or contractor. The establishment of a threshold level enables the procuring entity to disregard those tenders whose technical competence rating is too low to merit futher consideration.

The procuring entity is presented with three options as to how to combine an evaluation of technical and price factors. The first option, in paragraph (4)(i), is presented because, if the qualification threshold is set at a high level, then those suppliers and contractors that attain a rating at or above that level would in all probability be able to provide the services at a more or less equal level of competence. This would permit the procuring entity to put those tenders through a straightforward price competition where the tender with the lowest price would be the successful one.

In the second option, as set out in paragraph (4)(ii), the procuring entity may wish to weight and rate the price of the tenders as a separate criterion, and then combine the two weighted criteria in evaluating each tender. It would then compare the ratings of the tenders on the basis of the combined evaluations and the tender with the highest combined rating would be the successful one.

Under paragraph (4)(iii), the procuring entity may negotiate with suppliers so as to ascertain the succesful tender. Such negotiations are subject to article 37x.

Article 37x. Negotiations

(1) The procuring entity may engage in negotiations with suppliers and contractors as a means of ascertaining the most succesful tender if it has so specified in the solicitation documents.

(2) (a) Any negotiations between the procuring entity and a supplier or contractor shall be confidential.

(b) Subject to article 11, one party to the negotiations shall not reveal to any other person any technical, price or any other information relating to the negotiations without the consent of the other party.

(3) The procuring entity shall employ the following procedures in the negotiations with suppliers or contractors:

(a) invite for negotiations on the price or other aspects of its tender, the supplier or contractor that has attained the highest rating in accordance with article 37w(3);

(b) inform the suppliers or contractors that attained ratings above the threshold level that they may be considered for negotiations if the negotiations with the suppliers or contractors with higher ratings do not result in a procurement contract;

(c) inform the other suppliers or contractors that they did not attain the required threshold level;

(d) if it appears to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (3)(a) of this article will not result in a procurement contract, the procuring entity shall inform that supplier or contractor that it is terminating the negotiations;

(e) the procuring entity shall then invite the supplier or contractor that attained the second highest rating for negotiations; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers and contractors for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining tenders.

Comment: It would appear that negotiations to ascertain the most successful tender are most commonly used in the procurement of consultancy services. Article 37x aims at ensuring that the negotiations are fair to both the procuring entity and the suppliers and contractors by providing for confidentiality and respect for the ranking in the technical rating, while leaving the procuring entity some flexibility in determining which supplier or contractor best meets its needs.

Article 37y. Request for quotations

(Subject to approval...(each State designates an organ to issue the aproval),) the procuring entity may engage in procurement for services by means of a request for quotations in accordance with article 36 when the circumstances in article 15 arise in regard to the procurement of services.

Article 37z. Conditions for use of single source procurement

(Subject to approval... (each State designates an organ to issue the approval),) the procuring entity may engage in single-source procurement for services in accordance with article 37 when the circumstances in articles 14(1)(d) and 16 arise in regard to the procurement of services.

Comment to articles 37y and 37z: These articles make applicable to the procurement of services articles 15, 16, 36 and 37, in case it may be appropriate to procure services by means of request for quotations or single source procurement. The conditions for use and the procedures for those two methods as applicable in the procurement of goods and of construction are therefore made applicable to the procurement of services.